The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*): Making Wine from Water or More Water than Wine

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Abstract

In the summer of 2019, the UN International Law Commission adopted a set of Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*) on first reading. The Draft Conclusions cover various aspects relating to the methodology for the identification of peremptory norms and consequences of peremptory norms. The elaboration of the Draft Conclusions by the Commission provides an opportunity for the clarification of peremptory norms in order to take it out of the proverbial garage. Whether this potential is fulfilled will depend on a number of factors, including whether the Draft Conclusions are coherent, reflect practice, and address important practical considerations. The article suggests that, drawing on existing instruments, the Draft Conclusions formulate existing rules in more precise ways, and do so in a coherent manner.

Keywords

peremptory norms of general international law – identification – legal effects – International Law Commission (ILC)

1 Introduction

During its 71st session, the UN International Law Commission adopted a set of Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*) on first reading.[1] The Commission's Draft Conclusions, adopted with little fanfare, represent the Commission's contribution to taking the proverbial car that is *jus cogens* out of the garage.[2]

Allain Pellet once observed that *jus cogens* had the same initials as Jesus Christ.[3] According to the bible, amongst many of his miracles, Jesus Christ turned water into wine. Likewise, *jus cogens* has the potential to perform, in international law, miracles.[4] Depending on who you ask, *jus cogens*

[1] Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) (with commentaries), *Report of the International Law Commission,* Seventy-First Session, General Assembly Official Records, Supp No 10 (A/74/10), Chapter IV, para. 57.

[2] The concept of peremptory norms of general international law (*jus cogens*), has often been referred to as a car stuck in a garage. *See* G. Abi-Saab, 'The Third world and the Future of the International Legal Order', 29 *Revue egyotienne de droit international* (1973) p. 27 at 53; Ian Brownlie 'Comment', in A. Cassese and J. Weiler (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, Berlin, 1988) p.110.

[3] A. Pellet, 'Conclusions', in C. Tomuschat and J. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Marttinus Nijhoff, Leiden, 2005), at p. 217.

[4] In the words of the Special Rapporteur, during the introduction of his third report, 'for some, including some in the Commission, *jus cogens* was super brilliant and could perform magic beyond the dreamer's wildest dreams, while for others, its consequences were no different from those of other rules of international law …'. (A/CN.4/SR.3414).

can perform such international law miracles as eviscerating all effects of immunities[5] and establishing the jurisdiction of international courts and tribunals where no consent to such jurisdiction has been given.[6] Indeed, even the less contested legal effects of *jus cogens* are nothing short of revolutionary (if not miraculous), from an international law perspective: the creation of obligations *sans* the consent of States, the termination of obligations freely undertaken 'simply' because they conflict with norms of *jus cogens* and a duty to cooperate to bring to an end of breaches of *jus cogens*. It is thus no wonder that the concept of peremptory norms has often been described if not as miraculous *ala* the maker of wine from water, then as magical.[7]

While *jus cogens* holds the promise of the miraculous, the question that this article addresses is whether the Commission's Draft Conclusions themselves contribute anything to the development of peremptory norms of general international law or whether, in the words of member of the Commission Eduardo Valencia-Ospina, they are more water than wine and offer little to contribute to the development of the law relating to peremptory norms.[8] This article is not primarily concerned with whether the content of the Draft Conclusions are correct from an international law perspective. It accepts that the Commission, in elaborating the Draft Conclusions, had to make certain choices which some will agree with and others will not agree with. The question is whether these choices help to bring *jus cogens* out of the proverbial garage. In the next section, a brief overview of the set of Draft Conclusions is given, followed by some observations on the contribution they make, if any, to current international law.

2 The Draft Conclusions: An Overview

2.1 *General*

The Commission's approach to the study of peremptory norms has not followed the traditional approach of adopting several provisions with commentaries over a number of years. Instead, the Commission took a decision to retain all the Draft Conclusions in the drafting committee. As a result, the Commission adopted, at one go, the full set of Draft Conclusions in 2019.[9] The result is that until the adoption of the report of the Commission in 2019, the content and direction of the work of the Commission was largely unknown.[10] The Draft Conclusions adopted by the Commission are thus largely unknown and a brief descriptive overview is warranted.

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[5] A strong proponent of this view is A. Orakhelashvili 'Audience and Authority – the Merit of the Doctrine of *Jus Cogens'*, 46 *Netherlands Yearbook of International Law* (2015) pp.115, 138-143. *See also* T. Weatherall '*Jus Cogens* and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence', 46 *Georgetown Journal of International Law* (2015) p.1151.

[6] *See for discussion*, International Court of Justice *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, ICJ Reports* 2006, p. 6, para. 15. *See also* International Court of Justice *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), ICJ Reports* 2015, p. 3, para. 88.

[7] A. Bianchi 'Human Rights and the Magic of *Jus Cogens*',19 *European Journal of International Law* (2015) p. 491; D. Shelton 'Sherlock Holmes and the Magic of *Jus Cogens*', 46 *Netherlands Yearbook of International Law* (2015) p. 23. *See also* A. D'Amato 'It's a Bird, It's a Plane, It's *Jus Cogens*', 6 *Connecticut Journal of International Law* 1 (1990), p. 2 ('Indeed, the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power'.)

[8] The statement (on file with author), was delivered in the context of the first report in 2016. The Summary Records (A/CN.4/SR.3322), does not reflect the metaphorical retort.

[9] The decision of the Commission elicited some negative reactions from a few states. *See* for summary of the criticism and the response thereto, D. Tladi, *Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law* (*Jus Cogens*) (A/CN.4/727), paras. 6, 13 and 15.

[10] The only source for the work of the Commission on the topic, in addition to the reports of the Special Rapporteur and the reports of the Chair of the Drafting Committee, had~~s~~ been articles written by members of the Commission in their personal capacities. See, e.g. S. Murphy 'Crimes against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission', 111 *American Journal of International Law* (2017) p. 970; *see also* D. Tladi, 'Immunities, Crimes against Humanity and Other Topics in the 69th Session of the International Law Commission', 42 *South African Yearbook of International Law* (2017) p. 269; D. Tladi, 'Progressively Developing and Codifying International Law: The

Before providing an overview of the Draft Conclusions, it is useful to identify some constraints on the Commission in producing these Draft Conclusions. The first constraint, raised by several members of the Commission and States throughout the consideration of the topic, is the dearth of practice relating to the identification of peremptory norms and its consequences.[11] While many members of the Commission and delegates of the Sixth Committee expressed the view that the work of the Commission had been based on a sufficient amount of practice,[12] it was the case that practice was less abundant in relation to peremptory norms than in relation to other topics of international law.

A second, but related constraint, concerns the Commission's mandate. The topic of *jus cogens* raises a lot of interesting theoretical debates. The Commission's decision to take up the topic may have resulted in the hopes that the Commission would resolve some of these theoretical debates, and in that way create wine from water.[13] Yet the mandate of the Commission is codification and progressive development of international law and not the resolution of theoretical debates.[14] Its function is to elucidate, on the basis of practice, the law and not to propagate in favour of one or the other theoretical approach.[15] I, as Special Rapporteur for peremptory norms, have consistently expressed the view that the approach and purpose of the Commission ought not to be "to resolve theoretical debates – although these will necessarily have to be referred to – but rather to provide a set of Draft Conclusions that reflect the current state of international law relating to *jus cogens*".[16] There is, of course, at least a potential conflict between the first and second constraint. While the second constraint requires that the Commission base its work on practice, according to the first constraint there is a dearth in practice. The Special Rapporteur's approach to this tension is that the Commission's conclusions should "find support in the practice of States and jurisprudence", with scholarly writings being used to "provide a framework for the systematisation" of such practice.[17]

At least in part because of these constraints, the Commission's objective in its study of peremptory norms appears to have been a modest one. The Commission has explained that the Draft Conclusions are "aimed at providing guidance to all those who are called upon to determine the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences".[18] The aim thus seems to be to clarify the methodological rules of law and to promote a more uniform approach to the identification of peremptory norms of international law. As a result, *novelty* is not the primary aim of the Draft Conclusions. Yet even without novelty, the

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Work of the International Law Commission in its 68th Session', 41 *South African Yearbook of International Law* (2016) p. 165.

[11] *See, e.g*., statements by China (A/C.6/70/SR.18), the United State (A/C.6/70/SR.20), United States (A/C.6/71/SR.26), France (A/C.6/71/SR.20), The Netherlands (A/CN.6/71/SR.26), Israel (A/C.6/73/SR.27). *See also* statements by members of the Commission, *e.g*., Zagaynov (A/CN.4/SR.3416), Murphy (A/CN.4/SR.3416), Rajput (A/CN.4/SR.3418). *See* for discussion D. Tladi *First Report of the Special Rapporteur on Jus Cogens* (A/CN.4/693) (2016), paras 10 and 14, D. Tladi *Second Report of the Special Rapporteur on* Jus Cogens (A/CN.4/706), paras. 10 and 12, Fourth Report, supra note 9, paras. 16 and 18.

[12] *See, e.g*. statements of Austria (A/C.6/73/25), Brazil (A/C.6/73/SR.25), Japan (A/C.6/SR.26), Portugal (A/C.6/SR.27). *See also, e.g.,* statements of Saboia (A/CN.4/SR.3415), Šturma (A/CN.4/SR.3416), Lehto (A/CN.4/SR.3417), Oral (A/CN.4/SR.3419) and Hmoud (A/CN.4/SR.3420).

[13] *See* for discussion Orakhelashvili, *supra* note 5, p. 135.

[14] On the mandate of the Commission *see* C. Jalloh, 'Introduction: The Role and Contribution of the International Law Commission to the Development of International Law, A Symposium Celebrating the 70th Anniversary of the ILC', 13 *Florida International University Law Review* (2019) p. 975, pp. 975-980.

[15] Writing before the adoption of the Draft Conclusions, ~~the Special Rapporteur~~ I, as Special Rapporteur, made the following observations: '[…] when I first proposed the topic, I had fully expected that the Commission would decide not to take [it] up. My intention had then been that, after the rejection by the Commission, I would go off and write a book – without, by the way, the constraints of practice'. D. Tladi, 'Codification, Progressive Development, New Law, Doctrine, and the Work of the International Law Commission on Peremptory Norms of General International Law (*Jus Cogens*): Personal Reflections of the Special Rapporteur', 13 *Florida International University Law Review* (2019) p. 1192.

[16] First Report, *supra* note 11, para. 11.

[17] *Ibid.,* para. 45.

[18] Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 1, para. 2.

Draft Conclusions should add some value and should not merely add to the ever-increasing literature on peremptory norms.

The Draft Conclusions are divided into four parts. Part one provides provisions of an introductory nature. Part two is concerned with the rules for the identification of peremptory norms. Part three concerns legal effects of peremptory norms, while the final part contains provisions of a general nature. While the commentaries should be seen as an integral part of the Draft Conclusions, time and space permit only brief and unsystematic references to them in the broad overview of the Draft Conclusions that follows.

2.2 *Introductory Provisions*

Part one is titled "Introduction" and contains three Draft Conclusions. Draft Conclusion 1 sets forth the scope of the set of Draft Conclusions,[19] while Draft Conclusion 2 and 3 provides the definition and general nature of the peremptory norms of general international law. The definition of peremptory norms, contained in Draft Conclusion 2, simply reproduces the definition of the peremptory norms in the second sentence of Article 53 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), with minor modifications.[20] The first report of the Special Rapporteur had proposed a different definition, but the Commission decided to stick with the formulation in Article 53 of the Vienna Convention.[21] Although the Vienna Convention qualifies its definition as being "[f]or the purposes of the present Convention", according to the Commission, it has "come to be accepted as a general definition which applies beyond the law of treaties".[22]

Draft Conclusion 3, titled "general nature of peremptory norms", states as follows: "Peremptory norms of general international law (*jus cogens*) reflect and protect the fundamental values of the international community of States, hierarchically superior to other rules of international law and are universally applicable."

While the commentaries present extensive evidence of practice supporting the content of this Draft Conclusion, this Draft Conclusion was not unanimously accepted within the Commission.[23] That some members of the Commission did not accept Draft Conclusion 3 is made abundantly clear in the commentaries. In the first paragraph, for example, it is stated that the:

> view was expressed that such 'characteristics' have an insufficient basis in international law, unnecessarily conflate the identification and effects of these norms, and risk being viewed as additional criteria for determining whether a specific peremptory norm of general international law (*jus cogens*).[24]

To take away any doubt about the existence of a minority view, elsewhere it is stated that a view was expressed that "the difference between 'criteria' and 'characteristics'" as well as "the

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[19] *Ibid*., Draft Conclusion 1 states: 'The present Draft Conclusion concerns the identification and legal consequences of peremptory norms of general international law (*jus cogens*)'.

[20] *Ibid*., Draft Conclusion 2: 'A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognised by the international community of States as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law ~~(*jus cogens*)~~ having the same character'. ~~The insertion of the second phrase '(*jus cogens*)' in the definition is probably incorrect since 'norm of general international law' on its own is not *jus cogens*.~~

[21] *See* First Report, *supra* note 11, para. 74 (proposed Draft Conclusion 3 para. 1: 'Peremptory norms of general international law (*jus cogens*) are those norms of general international law accepted and recognised by the international community of States as a whole as those from which no modification, derogation or abrogation is permitted'.)

[22] Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 2, para. 1.

[23] For evidence supporting this provision *see* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 3, paras. 3-7 (fundamental values), paras. 9-11 (hierarchical superiority), paras. 13-15 (universal applicability).

[24] Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 3, para. 1.

proposition that such 'characteristics' provide supplementary evidence" were "obscure".[25] Yet for some Draft Conclusion 3 "almost went without saying and its basic premise was so basic that it did not require substantial justification".[26] Although only a minority of members opposed the Draft Conclusion,[27] their opposition was so intense that the drafting committee was not able to adopt it in the year that it was proposed.[28] There were two main reasons for the opposition to these core characteristics. The first was that these were not supported by practice.[29] The second reason was that the inclusion of these characteristics in a Draft Conclusion established (or seemed to establish) requirements for the identification of peremptory norms not contained in Article 53 of the Vienna Convention.[30] As for the first objection, the commentaries go into some detail describing international and national jurisprudence, statements by States and scholarly writings supporting the characteristics.[31] With respect to the second objection, the commentaries explain the relationship between the criteria for the identification of peremptory norms and the characteristics. According to the commentaries, the characteristics in Draft Conclusion 3 "are themselves not criteria" but "may provide an indication of the peremptory status of a particular norm".[32] To illustrate this relationship, the commentary states that "evidence that a norm reflects and protects fundamental values, is hierarchically superior to other norms … and is universally applicable, may serve to support or confirm" that the norm is a peremptory norm of general international law.[33] Presumably the converse is true, i.e. evidence that a norm is not viewed by States as reflecting these characteristics would indicate that the norm in question is not peremptory.

2.3 *Identifying Peremptory Norms*

Part two, which contains six Draft Conclusions, is in a way, the heart of the set of Draft Conclusions. It addresses the methodology and the tools for the identification of whether a norm is of peremptory character. Draft Conclusion 4 identifies two criteria necessary for the establishment

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[25] *Ibid*., para. 16.

[26] Tladi, *supra* note 15, p. 1196. In the article, the provision is described as 'international law 101'.

[27] The members of the Commission opposing the content of this Draft Conclusion, either in full or in part, were Wood (A/CN.4/SR.3314) ('..the Special Rapporteur attempted, not very convincingly, to elaborate on what was written in article 53 of the Vienna Convention by introducing the notion of … three other 'core elements' that characterized *jus cogens* norms ... those elements were not helpful, and by adding them the Special Rapporteur seemed to depart from his initial commitment to ensure that his reports reflected contemporary practice'.); Nolte (A/CN.4/SR.3315), Murphy (A/CN.4/3316), Forteau (A/CN.4/SR.3317) ('was not in favour of adopting Draft Conclusion 3 (2), which did not appear to be grounded in practice or jurisprudence and contained legally ambiguous terms. The concepts of 'fundamental values' and 'hierarchy', in particular, did not appear in the Vienna Convention, and including them in the Draft Conclusions would amount to a legal innovation, which, moreover, was not necessary'), Singh (A/CN.4/SR.3322) ('Draft Conclusion 3 (2) was problematic in that it was not clear how describing jus cogens norms as 'hierarchically superior to other norms of international law' enhanced their peremptory nature or non-derogability… It was also unclear what was meant by 'fundamental values of the international community' and how they could be identified'), Kolodkin (A/CN.4/SR.3371), Huang (A/CN.4/SR.3373). The vast majority of the members of the Commission, however, supported the content of the Draft Conclusion. See Caflisch (A/CN.4/SR.3314), Kittichaisaree (A/CN.4/3315), Saboia (A/CN.4/SR.3315), Candiotti (A/CN.4/SR.3317), Park (A/CN.4/SR.3322), Vasquez-Bermudez (A/CN.4/3322), Šturma (A/CN.4/3322), Hmoud (A/CN.4/SR.3322), Jacobsson (A/CN.4/SR.3322), Niehaus (A/CN.4/3323), Commissario Afonso (A/CN.4/SR.3323), Kamto (A/CN.4/3323), El Murtadi (A/CN.4/SR.3323), Al Marri (A/CN.4/SR.3323), Nguyen (A/CN.4/SR.3369), Hassouna (A/CN.4/SR.3370), Lehto (A/CN.4/SR.3372), Jalloh (A/CN.4/SR.3372), Ruda Santolaria (A/CN.4/SR.3372), Reinisch (A/CN.4/SR.3372), Cissé (A/CN.4/SR.3373), Galvão Teles (A/CN.4/SR.3373), Oral (A/CN.4/SR.3373),

[28] *Ibid.;* according to the Statement of the Chairman of the Drafting Committee (2016), the draft was not adopted for lack of time, p. 5, <http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2016_dc_chairman_statement_jc.pdf&lang=E , accessed 24 September 2019.

[29] Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 3, para. 1.

[30] *Ibid.,* para. 16.

[31] *Ibid.,* para. 3-7 (fundamental values), 9-11 (hierarchical superiority), 13-15 (universal applicability).

[32] *Ibid*., commentary to draft Article 3, para. 16.

[33] *Ibid.*

of the peremptory character of a norm. These criteria are distilled from the definition of peremptory norms contained in Draft Conclusion 2. First, the norm in question must be a "norm of general international law". The second requirement is that the norm must "be accepted and recognised as one from which no derogation is permitted and which can only be modified by a subsequent norm … having the same character". The rest of the Draft Conclusions in part two elaborate further on the two criteria in Draft Conclusion 4.

Draft Conclusion 5 is concerned with the first criterion, a norm of general international law, and identifies the sources of international law that qualify as a "general international law". It identifies customary international law as "the most common basis for peremptory norms".[34] The Draft Conclusion adopts a more ambivalent approach in respect of treaties and general principles of law, which, according to the Draft Conclusion, "may also serve as bases for peremptory norms".[35] This hesitant language suggest that while "it is not impossible for provisions of a treaty and general principles to form the basis of peremptory norms", this is not common. It is interesting to note that the Special Rapporteur had proposed that general principles and treaties be treated differently.[36] In the text proposed in the second report, general principles "can also serve as basis for peremptory norms" while "a treaty rule may reflect a norm of general international law capable of rising to" peremptory status.[37] This implies that a treaty provision *as such* is incapable of forming the basis of a peremptory norm, although a treaty provision may reflect a norm of general international law, such as customary international law, which can form the basis of a peremptory norm of general international law. Although the Commission chose to treat general principles of law and treaty rules on an equal footing, remnants of the Special Rapporteur's distinction remain in the commentary. The commentary, for example, explains that the role of treaties as a basis for peremptory norms is to be understood in the context of "the relationship between treaty rules and customary international law as described" in the *North Sea Continental Shelf* cases,[38] i.e. that treaty rules can reflect or codify customary international law. This seems to suggest that for treaty provisions to serve as a basis for the peremptory character of a norm, it is necessary that such treaty provisions reflect or codify customary international law.[39]

Draft Conclusion 6 elaborates on the second requirement, namely that a norm, in addition to being a norm of general international law, must also be accepted and recognised as one from which from no derogation is permitted and which can only be modified by a subsequent norm having the same character. This requirement while consisting of several elements is described by the Commission as "a single criterion", the emphasis of which is the "acceptance and recognition" element.[40] The other elements of the criteria tell us what is to be accepted and recognised and who must do the accepting and recognising.[41] As to the second element, i.e. what is to be accepted and recognised, it is that the norm is one from which no derogation is permitted and that it can be only be modified by a subsequent norm having the same character. This second element is itself a

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[34] Draft Conclusions, *supra* note 1*,* Draft Conclusion 5(1).
[35] *Ibid*., Draft Conclusion 5(2).
[36] Second Report, *supra* note 11, para. 48-58.
[37] *Ibid.,* para. 91, Draft Conclusion 5(3) ('general principles of law') and Draft Conclusion 5(4) ('treaties').
[38] *North Sea Continental Shelf* cases *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* 1969, *ICJ Reports* p. 3, para. 61. This relationship is also reflected in Draft Conclusion 11 of the International Law Commission's Draft Conclusions on the Identification of Customary International Law, *Report of the International Law Commission, Seventieth Session,* General Assembly Official Records (A/73/10).
[39] *See also,* Draft Conclusions on Customary International Law, supra note 38, commentary to Draft Conclusion 13, para. 2. ('The phrase 'as such' is intended to indicate that even when reflected in a treaty provision, a peremptory norm of general international law (*jus cogens*) retains its validity independent of the treaty provision. This means that while the reservation may well affect the treaty rule and the application of the treaty rule, norm, as a peremptory norm of general international law (*jus cogens*) will continue to apply. The rule reflected in this paragraph of Draft Conclusion 13 flows from the normal operation of international law. It derives … from the fact that the treaty provision over which a reservation has been formulated, and the peremptory norm of general international law (*jus cogens*) in question, have separate existence'.)
[40] *See ibid.,* commentary to Draft Conclusion 6, para. 1.
[41] *Ibid.*

composite element which can be said to represent the peremptory character of the norm in question. In other words, this second element means that what is accepted and recognised is that the norm in question is one which has peremptory status. With respect to the second element, i.e. whose acceptance and recognition is being referred to, according to the Draft Conclusion it is the international community of States as a whole whose acceptance is recognised. The second criterion can thus be said to be that the norm in question is accepted and recognised by the international community as a whole as one which has peremptory status. This criterion, like *opinio juris sive necessitas* in relation to customary international law, is the subjective element for the identification of peremptory norms of general international law – what has sometimes been referred to as *opinio juris cogentis*.[42]

Draft Conclusion 7 concerns the second element of the second criterion, namely the phrase "the international community of States as a whole". Draft Conclusion 7 makes it plain that it is the acceptance and recognition of States and not that of other actors that is relevant for the determination of the peremptory status of a norm.[43] It further qualifies this by requiring the acceptance and recognition of a very large majority of States. Thus, while a simple majority will be insufficient, it is not required that all States accept and recognise the peremptory character of the norm in question. Draft Conclusion 8 describes the materials that may serve as evidence for establishing acceptance and recognition.[44] Draft Conclusion 9 provides that "decisions of international courts and tribunals, in particular the International Court of Justice, are subsidiary means" for determining the peremptory character of a norm.[45]

2.4 *Legal Consequences of Peremptory Norms*

The consequences of peremptory norms are addressed in part three which contains 12 Draft Conclusions addressing legal consequences. The consequences can roughly be divided be into consequences for treaties (Draft Conclusions 10-13), consequences for other sources of obligations under international law (Draft Conclusions 14-16) and consequences under the law of state responsibility (Draft Conclusions 17-19). In addition, part three contains two Draft Conclusions of a general nature concerning interpretation (Draft Conclusion 20) and procedural requirements (Draft Conclusion 21).

The consequences of peremptory norms for treaty rules are structured in accordance with the 1969 Vienna Convention. They follow the bifurcated approach in which a distinction is made between treaties which, at the time of conclusion, conflict with an existing peremptory norm (Article 53), on the one hand, and, on the other hand, treaties which conflict with a peremptory norm that emerges subsequent to the conclusion of the treaty (Article 64). Draft Conclusion 10, following this bifurcated approach, spells out that in the case of the former, the "treaty is void" and its provisions "have no legal force", while in the latter case the "existing treaty becomes void and terminates". The consequences of invalidity of treaty conflicting with a peremptory norm under Article 71 of the Vienna Convention are reproduced in Draft Conclusion 12 following the same bifurcated approach, while Draft Conclusion 11, also following the bifurcated approach and sticking closely to Article 44 of the Vienna Convention, addresses separability of treaty provisions conflicting with peremptory norms. Draft Conclusions 10 to 12 in their content reproduce the provisions of the Vienna Convention.

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[42] *See* for discussion, Second Report, *supra* note 11, para. 77.

[43] *See* Draft Conclusions, *supra* note 1, Draft Conclusion 7(1); *see also* para. 2 of the commentary to Draft Conclusion 7 ('This paragraph seeks to make clear that it is the position of States that it is relevant and not that of other actors'.).

[44] *Ibid.*, Draft Conclusion 8, para. 2: 'Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organisation or an intergovernmental conference'.

[45] Draft Conclusions, *supra* note 1, Draft Conclusion 9(1). The Draft Conclusion also provides that works of expert bodies and scholarly writings 'may also serve as subsidiary means' for determining the peremptory status of a norm.

Unlike the other Draft Conclusions concerning treaties, Draft Conclusion 13 on reservations does not reproduce the content of Article s 19, 20 and/or 21 of the Vienna Convention. Instead, Draft Conclusion 13 is based on the ILC's Guide to Practice on reservations.[46] Like the Guide to Practice, the Draft Conclusions do not prohibit a reservation to a treaty provision that reflects a peremptory norm of general international law, but instead merely provides that such a reservation would not affect the binding character of the underlying peremptory norm, which continues to apply.[47] The second element of Draft Conclusion 13, also based on the guide to practice, provides that a reservation cannot exclude or modify a treaty provision in a manner that is contrary to a peremptory norm. As in the Guide to Practice, the Commission made a conscious decision not to follow the Human Rights Committee approach which had determined that a reservation to a treaty provision that reflects a peremptory norm is invalid.[48] While the application of both the General Comment and the Draft Conclusion would lead to the result that the obligation remains binding on the reserving State[49] – under the General Comment, the obligation would be binding both as a treaty rule and as a peremptory norm, while under the Draft Conclusion it would only be binding under peremptory norm – the primary difference in effect is that under the Draft Conclusions, any treaty processes, such as a dispute settlement mechanism, would be excluded if the reservation were not applicable.

Draft Conclusions 14, 15 and 16 address the legal consequences of peremptory norms for customary international law, unilateral acts and decisions of international organisations. There are no treaty texts, or even prior Commission text, on which the Commission could have based its Draft Conclusions. Instead, the Commission based these conclusions on the general formula applicable to treaties. Thus, the Draft Conclusions provide that, in respect of each source of international law, a legal obligation does not arise if it conflicts with an existing peremptory norm of general international law.[50] In cases where a pre-existing obligation conflicts with a peremptory norm that emerges subsequent to the obligation in question, the obligation will cease to exist.[51]

In respect of each of these sources of obligations, certain questions arose. For example, in respect of customary international law, the question arose whether, in light of the rule preventing the creation of a rule customary international law that conflicts with jus *cogens,* a subsequent peremptory norm either modifying or replacing the existing peremptory norm could arise.[52] After all, if the most common basis for peremptory norms were rules of customary international law, preventing a conflicting rule of customary international law from arising would make it nearly

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[46] Guide to Practice on Reservations to Treaties, *Report of the International Law Commission on the Work of its Sixty-Third Session (Addendum),* General Assembly Official Records Suppl. No. 10 (A/66/10/Add.1), guideline 4.4.3.

[47] *See* Draft Conclusion 13(1) of the Draft Conclusions on peremptory norms of general international law (*jus cogens*): 'A reservation to a treaty provision that reflects a peremptory norm of general international law (jus cogens) does not affect the binding nature of that norm, which shall continue to apply as such'.

[48] Human Rights Committee General Comment No 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocol thereto, Official Records of the General Assembly Suppl No 40 (A/49/40), Vol I, Annex V, para. 8 ('Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant'.)

[49] *See* Draft Conclusions, *supra* 1, commentary to draft Article 13, para. 2. ('It is important to emphasise that, whatever the validity of the reservation in question, a State cannot escape the binding nature of a peremptory norm …by formulating a reservation to a treaty provision reflecting that norm'.)

[50] *Ibid.*, Draft Conclusion 14(1) provides that a 'rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*)'; Draft Conclusion 15(1) provides that a 'unilateral act of a State manifesting the intention to be bound by an obligation under international law that would conflict with a peremptory norm of general international law (*jus cogens*) does not create such an obligation'; and Draft Conclusion 16 provides that a 'resolution, decision or other act of an international organisation that would otherwise create have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*)'.

[51] *Ibid.*, Draft Conclusion 14(2) provides that a 'rule of customary international law not a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*)'; Draft Conclusion 15(2) provides that an 'obligation under international law created by a unilateral act of a State ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*)'.

[52] *See ibid.,* commentary to Draft Conclusion 14, para. 6.

impossible for a modifying peremptory norm to emerge since foundational customary international law rules would never arise. To address the issue, the Draft Conclusion states that the rule in Draft Conclusion 14 is "without prejudice to the possible modification of a peremptory norm by a subsequent" peremptory norm. According to the commentary, a customary international law rule in conflict with a peremptory norm may well arise if such a customary international rule itself is accepted and recognised as one from which no derogation is permitted.[53] In respect of Draft Conclusion 16 (obligations created by decisions of international organisations), the main question for the Commission was whether decisions of the UN Security Council should be explicitly included in the text of the Draft Conclusion. While the original Special Rapporteur's text had explicitly mentioned the UN Security Council,[54] the text adopted by the Commission does not explicitly mention the UN Security Council.[55] The commentary, however, makes it clear that Draft Conclusion 16 applies equally to decisions of the UN Security Council.[56]

While Draft Conclusions 10 to 12, and, indirectly, Draft Conclusions 14 to 16 are based on the Vienna Convention, Draft Conclusions 17 to 19 addressing aspects of State responsibility are based on the Articles on State Responsibility.[57] These State responsibility-related provisions are themselves uncontroversial, as they are adapted from the Articles on State Responsibility. Draft Conclusion 17 addresses, in part, the relationship between *erga omnes* obligations and peremptory norms. It states that peremptory norms "give rise to obligations" *erga omnes* and, as a consequence, that "[a]ny State is entitled to invoke the responsibility of another State for a breach of a peremptory norm".[58] What the Draft Conclusion does not address is the question whether all obligations *erga omnes* arise from peremptory norms. The commentary, however, does state that "it is widely considered that not all obligations *erga omnes* arise from peremptory norms".[59] Draft

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[53] *Ibid.*

[54] D. Tladi,*Third Report of the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*),* para. 160, Draft Conclusion 17(1) proposed by the Special Rapporteur ('Binding resolutions of international organizations, including those of the Security Council of the United Nations, do not establish binding obligations if they conflict with a peremptory norm of general international law (*jus cogens*')).

[55] Draft Conclusion 16, adopted by the Commission: 'A resolution, decision or other act of an international organisation that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*)'.

[56] *See, e.g*. Draft Conclusions, *supra* 1, commentary to Draft Conclusion 16, para. 2 ('Examples of a resolution, decision or act of an international organisation that would otherwise have binding effect include a decision of the Security Council, taken under chapter VII of the Charter of the United Nations'.); see also para. 4 of the commentary to Draft Conclusion 16 ('Resolutions, decisions or acts of the Security Council, however, require additional consideration since pursuant to Article 103 of the Charter of the United Nations, obligations under the Charter prevail over other rules of international law. For this reason, considering the hierarchical superiority of peremptory norms of general international law (*jus cogens*), the Commission considered it important to highlight that Draft Conclusion 16 applies equally to binding resolutions, decisions and acts of the Security Council'.)

[57] Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission (2001) Vol II, Part II.*

[58] Draft Conclusions, *supra* note 1, Draft Conclusion 17, para.1, which sets out that peremptory norms give rise to obligations *erga omnes,* is based on the para. 7 of the general commentary to Part Two, Chapter III of the Articles on State Responsibility ('Whether or not peremptory norms of general international law and obligations [*erga omnes*] are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the ICJ has given of obligations [*erga omnes*] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law'. The second paragraph of Draft Conclusion 17, which provides for the right of any State to invoke the responsibility of another State for breach of peremptory norms, is based on Article 48(1)(b) of the Articles on State Responsibility ('Any State other than the injured State is entitled to invoke the responsibility of another State if (a) … (b) the obligation beached is owed to the international community of States as a whole'.)

[59] *See* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 17, para. 3. Examples given of *erga omnes* obligations arising from norms not of peremptory character are 'rules relating to common spaces, in particular common heritage regimes'.

Conclusion 18 concerns circumstances precluding wrongfulness and is based on Article 26 of the Articles on State Responsibility.[60]

Draft Conclusion 19 on particular consequences of peremptory norms is based on Articles 40 and 41 of the Articles on State Responsibility. It provides for the duty on States to cooperate to bring to an end serious breaches of peremptory norms, not to recognise unlawful situations created by such breaches and not to assist or render assistance in the maintenance of such situations. According to the commentaries there were some members of the Commission that were of the view that Draft Conclusion 19 should apply to all breaches of peremptory norms and should not be limited to "serious breaches".[61] In the proposals contained in the Third Report of the Special Rapporteur, the duty to cooperate applied only to serious breaches of peremptory norms, while the duty of non-recognition and non-assistance applied to all breaches of peremptory norms. The Commission, however, decided that all of these particular consequences only applied in the event of ~~a~~ serious breaches of peremptory norms.

Draft Conclusion 20 is a general provision on interpretation applying to all consequences of peremptory norms. It provides that rules of international law should "as far as possible … be interpreted and applied so as to be consistent with" peremptory norms.[62] According to the Commission, this rule is "an application of article 31, paragraph 3 (c), of the 1969 Vienna Convention".[63] In the context of rules other than treaties, the Commission has referred to this rule in its commentaries to the Articles on State Responsibility.[64] This rule of interpretation is intended, principally, to mitigate against the far-reaching consequences of the invalidity of international obligations that, but for the existence of a peremptory norm, appear to have been duly established.

Another provision of general application is Draft Conclusion 21, titled procedural requirements. Draft Conclusion 21 proceeds from the basis of Articles 65 and 66 of the 1969 Vienna Convention. It provides procedural steps that are to be followed for invoking the invalidity of a rule of international law on the basis of peremptory norms. These procedural steps include notification, the time frame within which other States should respond and the duty to settle any disputes between the notifying State and the objecting States through amicable means.[65] In the event that there is no resolution of the dispute after a set period – 12 months – the notifying States may not rely on its assertion of invalidity until the dispute is resolved if "the disputing State or States [have offered] to submit the matter to the International Court of Justice".[66] The Draft Conclusion does not establish – and could not, even if it purported to – the jurisdiction of the International Court of Justice.[67] It is, however, aimed at encouraging the parties to any dispute concerning the application of the Draft Conclusions to use peaceful means, including, if necessary, the International Court of Justice, to resolve such disputes.

2.5 *General Provisions*

Part four of the Draft Conclusions contains two provisions of a general nature. Draft Conclusion 22 is general without prejudice. Beneath the still waters of Draft Conclusion 22 is a rather tumultuous origin. It provides as follows: "The present Draft Conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law."

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[60] Draft Conclusion 18 provides: 'No circumstances precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regards to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*)'.

[61] *See* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 19, para. 9.

[62] *Ibid*., Draft Conclusion 20: 'Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted so as to be consistent with the former'.

[63] *See ibid*., commentary to Draft Conclusion 20, para. 3.

[64] *See* Articles on State Responsibility, *supra* note 57, commentary to Article 26, para. 3.

[65] *See* Draft Conclusions, *supra* note 1, Draft Conclusion 21(1), (2) and (3).

[66] *Ibid.,* Draft Conclusion 21(4).

[67] *Ibid.,* Draft Conclusion 21(5).

The commentary to Draft Conclusion 1 had already intimated that "individual peremptory norms … may have specific consequences that are distinct from general consequences" of peremptory norms and that the Draft Conclusions do not address these specific consequences.[68] The Third Report had proposed one Draft Conclusion establishing the duty to exercise jurisdiction over crimes prohibited by peremptory norms,[69] and another providing that immunity *ratione materiae* does not apply in respect of such crimes.[70] A year earlier the Commission had adopted draft Article 7 excluding the application of immunity *ratione materiae* in cases involving specific crimes that are prohibited peremptory norms.[71] Against the background of the adoption of draft Article 7 by a recorded vote,[72] opposition from a minority of members and proposals from some members that the Special Rapporteur's proposals be aligned with draft Article 7 on immunity of States officials, the Special Rapporteur proposed the without prejudice clause as a solution.[73] The without prejudice clause is thus intended to signal that the fact that the Commission did not in these Draft Conclusions address the question of criminal jurisdiction and immunity does not mean that peremptory norms do not have consequences for the application of immunities and national criminal jurisdictions.[74]

The syllabus adopted by the Commission for the topic *jus cogens* explicitly included the elaboration of "an illustrative list of norms which have achieved the status of *jus cogens*".[75] The First Report posed the question whether the Commission should pursue the illustrative list, noting that the topic as proposed "is inherently about process and methodology rather than content of specific rules and norms" and that an "illustrative list might have the effect of blurring the fundamentally process-oriented nature of the topic".[76] Taking this "fundamentally process-oriented nature of the topic", the Commission decided not to elaborate a list of peremptory norms, but rather to provide, in an annex, peremptory norms previously identified by the Commission. These norms are, according to Draft Conclusion 23, included "without prejudice to the existence or subsequent emergence of other peremptory norms". The commentary associated with these norms does not, as is normally the case with commentaries, seek to justify the inclusion of each individual norm, but rather merely provides different terminology previously used by the Commission in relation to each norm.

3 What Contribution if Any to the Existing International Law

Many of the provisions in the Draft Conclusions can be characterised as being "based on" or "adapted from" either the Vienna Convention on the Law of the Treaties or the Articles on State Responsibility. An unsympathetic view of the Draft Conclusions might suggest that the Draft

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[68] *Ibid.,* commentary to Draft Conclusion 1, para. 5.

[69] *See* Third Report, *supra* note 54, Draft Conclusion 22 of the Draft Conclusions proposed by the Special Rapporteur, para. 160.

[70] *Ibid.,* Draft Conclusion 23.

[71] *See* draft Article 7 of the draft articles on the immunity of State officials, *Report of the International Law Commission, Sixty-Ninth Session,* General Assembly Official Records, Suppl. No. 10 (A/72/10).

[72] *Ibid.,* para. 74.

[73] *See* para. 161 of the International Law Commission, *Report of the International Law Commission, Seventieth Session,* (Suppl. No. 10 (A/73/10)).

[74] *See* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 22, para.2 ('The contents of individual peremptory norms of general international law (*jus cogens*) may themselves have legal consequences that are distinct from the general legal consequences identified in the present Draft Conclusions. Hence Draft Conclusion 22 is intended to convey that the Draft Conclusions are without prejudice to any such legal that may otherwise arise from specific peremptory norms…'. See also para. 4 of commentary to Draft Conclusion 22 ('One area in which the issue of legal consequences for specific peremptory norms has been raised concerns the consequences of crimes the commission of which are prohibited by peremptory norms …in particular the possible consequences for immunity and jurisdiction of national courts'.)

[75] The Syllabus '*Jus Cogens* (Dire Tladi), Annex to the *Report of the International Law Commission, Sixty-Sixth Session,* General Assembly Official Records, Suppl. No. 10 (A/69/10) para. 13.

[76] *See* First Report, *supra* note 11, para.16.

Conclusions are nothing more than a "cut and paste" of existing instruments. From this perspective, the Draft Conclusions might be seen, to borrow from Valencia-Ospina, as more water than wine. A closer look at the text of the Draft Conclusions, however, reveals that they make, at least potentially, a valuable contribution to international law.

If we accept codification as the more precise formulation and systematisation of existing rules of international law,[77] it should not be a surprise that the work of the Commission is based on existing instruments. The Commission's mandate is not to present the most innovative version of international law. It is – and should be – constrained in its output by available practice, including treaty practice and non-treaty instruments which are accepted by States. Seen in this light, it is not surprising that many of the provisions in the Draft Conclusions can be traced back to some or other instrument, nor should this be seen as a weakness. Yet, the Draft Conclusions do more than just repackage in a single instrument what is already out there. The Draft Conclusions provide the rules, some of which may already have been contained in other instruments, in a coherent and systematic fashion, revealing the connections between them.

Draft Conclusion 3, setting out the characteristics of peremptory norms, is a provision that has not been reflected in any previous instrument. The Vienna Convention does not describe peremptory norms as having the characteristics contained in Draft Conclusion 3. Yet, the content of the Draft Conclusion is not new or novel and has been referred to as "international law 101".[78] The commentary presents a variety of sources of State practice,[79] including domestic court decisions, statements by States as well as jurisprudence of international courts and tribunals.[80] It also refers to scholarly writings which almost all take for granted the characteristics contained in the Draft Conclusion 3.[81] The Commission has been able to put together in a single source a view which has received wide acceptance in a variety of materials. Although not in the text of the Draft Conclusions, the commentary also importantly clarifies the role of these characteristics. The authorities that had referred to these characteristics had not explained what role, if any, the characteristics played in the identification of peremptory norms. According to the commentary, the characteristics are not additional criteria.[82] However, the characteristics "may provide an indication of the peremptory status of a particular norm" or, put another way, "evidence that a norm reflects and protects fundamental values of the international community of States as a whole, is hierarchically superior to other norms … and is universally applicable" could be used to support the peremptory status of a norm.[83]

The definition of peremptory norm in Draft Conclusion 2 is one of the examples of what critics of these Draft Conclusions may point to as illustrative of the Commission's lack of innovation and dogmatic insistence on relying on language from previous instruments in elaborating the Draft Conclusions. Yet, as the commentary explains, Article 53 is accepted, both in doctrine and practice, as *the* definition of peremptory norms and not only for the purposes of the Vienna Convention.[84] To depart from that definition would require a justification beyond the need for novelty. The

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[77] The Statute of the International Law Commission defines codification as 'the more precise formulation and systematisation of rules of international law'. See Article 15 of the Statute of the International Law Commission, General Assembly Resolution 174 (II), 1947.

[78] *See* for this reference, Tladi, *supra* note 15), p.1196, quoting Charles Jalloh in a private conversation.

[79] *See, e.g*. Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 3, para.5, 10, 13 and 14

[80] *Ibid.,* paras. 4, 9 and 13.

[81] *Ibid.,* paras. 6, 11 and 14; *see* Robert Kolb, *Peremptory Norms of International Law, Jus Cogens: A General Inventory* (Hart, Oxford, 2015), at 32, describing the theory of *jus cogens* based on these characteristics as 'the absolutely predominant theory today'.

[82] *See* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 3, para. 16.

[83] *Ibid., See* also Second Report, *supra* note 11, para. 89 ('the characteristics of *jus cogens* … are not criteria for the identification of norms of *jus cogens.* They are, rather, descriptive elements that characterise the nature of *jus cogens.* It is therefore not necessary to show that a particular norm has the characteristics in order to qualify as a norm of *jus cogens.* Put differently, these descriptive elements are not additional requirements for *jus cogens* norms. … however, the belief by States that particular norms reflect the characteristics may be advanced in support' of the peremptory status of such norms'.)

[84] *See* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 2, para. 2.

criteria developed by the Commission on the strength of the Vienna definition make a particular contribution to international law relating to peremptory norms. While these criteria are presented by the Commission as flowing naturally from the definition, these criteria, by no means, go without saying. Indeed it has been suggested that the definition in Article 53 of the Vienna Convention cannot offer criteria because peremptory norms in Article 53 are defined in terms of its consequences, making it circular.[85] Moreover, as explained in the commentary, the language in Article 53 is capable of different interpretations, and it is possible to distil different criteria from it.[86] Linderfalk, for example, describing a positivist approach to Article 53 of the Vienna Convention states that what would be required is evidence "that States generally do not derogate from" the norm in question and that "they generally do not modify [that norm] by means other than the creation of a new *jus cogens* norm".[87] This is certainly different from the criteria identified by the Commission which does not require evidence that States do no generally derogate from and only modify by means of other peremptory norms, but rather acceptance and recognition of peremptory status – or to put it another way, belief that the norm is peremptory. Thus, it would be going too far to suggest that the criteria adopted in the Draft Conclusions were mechanically lifted from the Vienna Convention.

The other provisions on identification, though certainly not earth-shattering, also clarify important aspects of the methodology to be applied when identifying peremptory norms, while leaving room for development where the practice is lacking. Certainly, the principal message in ~~the~~ Draft Conclusion 5, namely that the main basis for peremptory norms is customary international law, does not tell us anything that was not already generally accepted.[88] Given the lack of practice and an apparent doctrinal difference of opinion within the Commission, the Commission adopts an ambivalent approach on whether treaty provisions and general principles of law can be the basis of peremptory norms. The language in the Draft Conclusion "may also serve as bases for peremptory norms" leaves open the possibility that treaties and general principles of law may play *some* role in the identification of peremptory norms, without being definitive about the role. Similarly, Draft Conclusion 7 concerning the meaning of "international community of States as a whole" clarifies and confirms aspects that were already largely known: it is the position of States that matter, and while a very large majority is required, unanimity is not required. Yet, it leaves open the question what is meant by a very large majority.[89] The Commission's Draft Conclusion gives those charged with having to identify whether a norm is peremptory sufficient guidance to make such determination without unduly restricting the ability to take into account different factors and circumstances.

Perhaps the provisions on which there is the least amount of innovation are those concerning legal consequences of peremptory norms. These provisions are, for the most part, taken in some cases verbatim from either the Vienna Convention or the Articles on State Responsibility. In general, the reliance on previous texts can be justified by the fact that practice has followed these texts.[90] However, there are some provisions which were not simply based on previous text. The rules pertaining to the legal consequences of peremptory norms for other sources of obligations, in particular customary international law and decisions of international organisations, though inspired by the equivalent rule concerning treaties, were not themselves taken from any previous

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[85] *See* for discussion, U. Linderfalk 'Understanding the *Jus Cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism', 46 *Netherlands Yearbook of International Law* (2015) p. 56.

[86] *See* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 4, paras. 4 and 5. For example, under one possible interpretation that has been advanced, the criteria are: (a) a norm and accepted and recognised as a norm of general international law; (b) from which no derogation is permitted; and (c) which can only be modified by a norm having the same character. *See also* U. Linderfalk, *Understanding* Jus Cogens *in International Law and International Discourse* (Elgar International Law, Abingdon, 2020), at 1.2.2.

[87] Linderfalk, *ibid*., at 5.3.1.

[88] *See* however, M. Janis, 'The Nature of *Jus Cogens*', 3 *Connecticut Journal of International Law* (1988) p. 361, contesting the customary international law basis of peremptory norms.

[89] *See* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 7, para.6.

[90] *See*, *ibid*., commentary to Draft Conclusion 10, para. 2.

text. The lingering question in respect of these rules remains whether the Commission ought to have been explicit in including the UN Security Council in the text of Draft Conclusion 16 rather than referring to it only in the commentary.

There were, however, opportunities for innovation which were not taken by the Commission. One member of the Commission, for example, had proposed that rather than stick dogmatically to the Vienna Convention, the Commission should accept the separability of treaty provisions that conflict with peremptory norms even in cases where the treaty conflicts with peremptory norm at the time of conclusion of the treaty, a position that would be ~~in conflict~~ at variance with the Vienna Convention's bifurcated approach.[91] This deviation from the Vienna Convention could be justified on account of the fact that there was little direct practice of treaties being invalidated in whole on account of conflict with peremptory norms, while there was at least some support for separability even in cases where there existed conflict between the treaty provision and the peremptory norm.[92] Similarly, the Commission chose to stick to the language of the Articles on State Responsibility limiting the particular consequences of breaches to peremptory norms to serious breaches. Yet, in the Third Report, the Special Rapporteur proposed a departure from the Draft Articles, extending the particular consequences to any breach of peremptory norms without the need to qualify it as serious.[93]

Another area in which the Draft Conclusions could have made some advance concerns immunities. The Third Report had proposed that immunity *ratione materiae* does not apply in respect of crimes prohibited by peremptory norms.[94] Instead of adopting this provision, the Commission decided to have a 'without a prejudice' clause to address the possibility of peremptory norms affecting immunities. Quite apart from the fact that the Commission had, in the previous session, adopted a similar provision in the Draft Articles on the Immunities of State Officials,[95] there was certainly some authority to support the provision proposed by the Special Rapporteur.[96] Yet even this decision may be justified. First, as the commentary explained, the topic is not concerned with the content or consequences of specific peremptory norms, but rather the methodology and

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[91] *See* International Law Commission, Nolte (A/CN.4/SR.3417), p.10-16.

[92] *See e.g.* UN General Assembly Resolution 34/65B (1979), in which the General Assembly '*Rejects those provisions* of the [Camp David] accords which ignore, infringe, violate or deny the inalienable rights of the Palestinian people, including …the right of self-determination', para. 2 and '*Strongly condemns* all partial agreements and separate treaties which constitute a flagrant violation of the rights of Palestinian peoples ..'., para. 3. *See also* Shelton, *supra* note 7, pp. 36-37. *See also* Draft Conclusions, *supra* note 1, commentary to Draft Conclusion 12, para. 2.

[93] *See* Third Report, *supra* note 54, para. 101. It is worth pointing out that, other than the Articles on State Responsibility, the authorities on which the Third Report relied upon for the Draft Conclusions on particular consequences do not limit the particular consequences to 'serious breaches'. *See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,9 July 2004, ICJ, Advisory Opinion, p.136, para. 159; *Amnesty International and Commonwealth Lawyers Association* v. *Secretary of State for the Home Department,* Judgment of the House of Lords, 8 December 2005, [2006] ALL ER 575, para. 34; *UN* General Assembly Resolution 2145 (XXI), UN Security Resolution 276(1970).

[94] Third Report, *supra* note 54, Draft Conclusion 23 para. 160.

[95] Although it should be noted that there were some differences between draft Article 7 and the Special Rapporteur's proposals, leading on member of the Commission to describe the Special Rapporteur's proposal as 'draft article 7 on steroids'. For a summary of the statement, without the metaphor, see Murphy (A/CN.4/SR.3316).

[96] *Ibid.,* paras. 121-132; s*ee* especially paras. 124-130, where decisions of national court decisions in which States exercised jurisdiction foreign officials (or former foreign officials), e.g. *Attorney-General of the Government of Israel* v. *Eichmann,* Judgment of the Supreme Court of Israel, English Translation in 36 *International Law Reports (1968)* 277; *Guatemala Genocide, Menchú Tumm and Others* v. *Two Guatemalan Government Officials and Six Members of the Guatemalan Military,* Judgment of the Constitutional Court of Spain of 26 September 2005; *Scilingo Manzorro* v. *Spain,* Judgment of the Supreme Court of Spain, 1 October 2005, *R* v. *Bartle and the Commissioner of Police and Others, Ex Parte Pinochet,* Judgment of the House of Lords of 24 March 1999, [1999] 2 All ER 97. *See also* D. Tladi, 'The international law commission's recent work on exceptions to immunity: Charting the course for a brave new world in international law?', 31 *Leiden Journal of International Law* (2019) p.169. To these, one might add recent cases in which some European States have sought to exercise jurisdiction over Syrian foreign officials for acts committed in connection with the Syrian conflict; *see* R. Alkousaa, 'Three Syrians arrested in Germany and France for Suspected Crimes against Humanity', *Reuters*, 19 February 2019, <https://www.reuters.com/article/us-germany-syria/three-syrians-arrested-in-germany-and-france-for-suspected-crimes-against-humanity-idUSKCN1Q21FO, accessed 30 September 2019);

general consequences of peremptory norms.[97] Second, while the inclusion of the provision on immunities could be justified by the existing case law, the practice is by no means clear and unequivocal.[98] Third, to address immunity explicitly would require that the Draft Conclusions also provide that peremptory norms had no effect on immunity *ratione personae* and immunity from civil jurisdiction, which could have the effect of freezing the law and from that perspective undermining progressive developments in those areas.[99]

Another provision which might be said to illustrate the Commission's lack of innovation concerns the elaboration of a non-exhaustive list of peremptory norms. While the syllabus had promised to include what it termed an illustrative list of peremptory norms, Draft Conclusion 23 and its accompanying annex only enumerate a list of norms previously identified by the Commission in the commentaries to other topics. While it is the case that by including the norms as part of the text rather than just the commentary, the authority of the peremptory character of the identified norms is enhanced, by limiting the norms to those identified by the Commission, the Draft Conclusion missed the opportunity to identify further norms.[100] As one member of the Commission remarked, the current list has the effect of keeping the Commission stuck in 1966.[101] The Commission did, of course, offer reasons for limiting its list to those norms that had already been identified in its previous work. In particular it noted that the Draft Conclusions concern the methodology for the identification of peremptory norms and not the content of the rules that

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[97] *See* Draft Conclusions, commentary on Draft Conclusion 1, para. 5; commentary to Draft Conclusion 22, para. 2-4. *See also* the summary of the Commission's debate in 2018, Tladi (A/CN.4/SR.3425) ('There was one particular criticism with which he had a great deal of sympathy. [Some members] had argued that [proposed] Draft Conclusion 22 and 23 differed from the other Draft Conclusions … in that they did not address methodological questions. Mr Zagaynov, for example, had correctly observed that Draft Conclusions 22 and 23 concerned specific consequences of certain *jus cogens* norms … such as the prohibition of genocide, rather than *jus cogens* in general. Mr Zagaynov had asked why the consequences of self-determination had not been considered. It might equally be asked why the consequences of the use of force, racial discrimination and so forth had not been considered separately…')

[98] S D. Murphy, 'Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?', 112 *AJIL Unbound* (2018) p. 4.

[99] *See* Third Report, *supra* note 54), para. 123 ('It is generally accepted that there are no exceptions, even for *jus cogens* crimes, with respect to immunity *ratione personae* … It can therefore be accepted that, as the law currently stands, there are no exceptions to immunity *ratione personae)* and, at para. 124 where the distinction is made between immunity in relation to criminal proceedings and immunity in relation to civil proceedings. See, especially comments of Special Rapporteur explaining the decision to withdraw the proposal in favour of the without prejudice clause, Tladi (A/CN.4/SR.3425): 'There was another reason for not attempting to address issues relating to primary rules. He believed that, for criminal matters, there was an exception to immunity *ratione materiae* under international law for all *jus cogens* crimes. However, he also believed that there was no exception for immunity *ratione personae.* Nevertheless, he was reluctant to include in the Draft Conclusions a provision recognising that there was no exception to immunity *ratione personae*. [Similarly] he believed that there was no exception for the immunity of officials or of the State in civil proceedings for *jus cogens* crimes'. To be fair the distinction between criminal proceedings and civil proceedings had been criticised. *See* Orakhelashvili , *supra* note 5, p. 139 ('Courts granting immunity for torture in civil proceedings try to distinguish between civil and criminal proceedings, suggesting that that while immunity can be denied in criminal proceedings, civil cases are arguably different. This may be true empirically in terms of *national law* … [b]ut that is hardly indicative of what the position under *international law* is') (emphasis added).

[100] See especially comments by member of the Commission, Nilufer Oral (A/CN.4/SR.3460) ('She was also concerned about the thematic nature of the list. In general, [proposed] Draft Conclusion 24 was focused on norms that related to international criminal law and international humanitarian law. That could easily lead to the conclusion that the norms of *jus cogens* did not apply to other areas of law'.). See also Jalloh (A/CN.4/SR.3461) ('In short, he was suggesting that the project, if approached carefully, provided the Commission with an opportunity to add value to the international community, to be creative … While international bodies such as the International Court of Justice had been cautious about adding 'new' examples of peremptory norms, various judicial bodies and other organs at the national level, regional and international levels had proposed ideas of what might constitute *jus cogens'*.)

[101] Jalloh (A/CN.4/SR.3461) ('Members should consider, for example, the implications of using a list dating back to the immediate post-decolonisation period, to a bipolar word characterised by the Cold War and the fear of nuclear annihilation. The International Bill of Rights had just been completed … It was the age before computers, the Internet and social media. The world today was significantly different from that world. The list proposed by the Special Rapporteur reflected the most widely recognised examples of peremptory norms at that time and the preoccupations of that period …')

constituted a peremptory norm.[102] The elaboration of a list of peremptory norms would call for an analysis of individual rules which would fall outside the scope of the topic as envisioned.[103] It noted in this connection that to elaborate a list of peremptory norms following its methodology "would require a detailed and rigorous study of many potential norms" which would mean straying into the substance of other topics.[104] Without the rigorous approach that would be required to elaborate a list *de novo,* the inclusion of norms already identified as having peremptory status was the only reasonable way to select from any number of norms that could have been put forward.

A problem often levelled against the idea of peremptory norms is that it can threaten the stability of international law if States can unilaterally free themselves from obligations, whether under treaty law, customary international law or binding Security Council resolutions, by claiming that the obligation in question conflicts with peremptory norms of international law. This problem of auto-interpretation applies generally to public international law due to the lack of compulsory jurisdiction by international courts without consent. The Vienna Convention attempted to address this issue by including a dispute settlement provision under which a dispute concerning the application of Article s 53 or 64 would, if not resolved amicably, trigger the jurisdiction of the International Court of Justice.[105] As a treaty rule, Article 66 could not be made applicable to a set of Draft Conclusions that did not constitute a binding instrument. At the same time, given the significance of the issue, the Draft Conclusion could not remain silent. As a solution, Draft Conclusion 21 provides that, in the event that a dispute concerning the invocation of invalidity on account of conflict with a peremptory norm is not resolved through amicable means, "and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved".[106]

This provision is intended to address the problem of auto-interpretation by encouraging submission of disputes to the International Court of Justice.[107] While not explicit, the provision seems to imply that in the event that the objecting States do not offer to submit the matter to the ICJ, the invoking State would be entitled to rely on the invalidity of the treaty.[108] On the other hand, if the objecting States do offer to submit the matter to the ICJ, the invoking State is almost compelled to accept the offer if it wants to rely on the invalidity.

4 Conclusions

The International Law Commission's adoption on first reading of a set of a Draft Conclusions on Peremptory Norms is potentially a landmark step in the efforts to get the proverbial car out of the garage. Whether, the Draft Conclusions will actually have that effect will depend on how they are received, mainly by States and in jurisprudence but, also in scholarly writings. Whether the Draft

[102] *See* Draft Conclusions, commentary to Draft Conclusion 23, para. 1..
[103] *Ibid*.
[104] *Ibid.* Such an exercise would, in addition to falling outside the scope of the topic, be inordinately long. In summing up the debate on the fourth report, the Special Rapporteur made the following observation: 'During the consideration of the topic in the Working Group [on the Long-Term Programme of Work], the members' former colleague Mr Forteau had said the task [of elaborating a list] could take 5 minutes or 50 years, depending on whether the Commission relied on *jus cogens* norms that it had already identified or embarked on a detailed study of each norm proposed for the list, including those for which there was not enough evidence'.
[105] Article 66(a) of the 1969 Vienna Convention on the Law of Treaties.
[106] Draft Conclusions, Draft Conclusion 21, para.5.
[107] *See, ibid.,* Draft Conclusion 21, para. 8 ('in the spirit of avoiding unilateralism, the Commission found it appropriate, without obliging submission of [the dispute to] the International Court of Justice, to encourage submission of the dispute to the International Court of Justice'.)
[108] Tladi, *supra* note 15, p. 1199, writing before the adoption of the provision by the Commission, states that it 'simply provides an incentive on both the objecting and invoking State to seek third party judicial settlement, without suggesting a legal obligation to do so'.

Conclusions are positively received in turn may depend on whether they make a contribution to the body of law on peremptory norms.

It may be tempting to suggest that the Draft Conclusions do not make a contribution because many of the Draft Conclusions are based on previous texts. The definition of peremptory norms and the legal effects of peremptory norms on treaties are sourced from and use the same language as that used in the Vienna Convention, while the consequences of peremptory norms for States responsibility borrow extensively on the Articles on State Responsibility and the commentaries to them. The Draft Conclusions, however, do much more than merely recite provisions of the Vienna Convention and Articles on State Responsibility. From the definition, the Draft Conclusions produce a well-thought out set of criteria for the identification of peremptory norms; from the consequences on treaty rules in the 1969 Vienna Convention and State practice, the Draft Conclusions produce consequences for other rules; they set out a rule of interpretation and even propose a nuanced procedure for dispute settlement which, if interpreted broadly, could address the problem of auto-interpretation in a novel way. But more importantly, the determination of whether the Draft Conclusions make a contribution to international law should not depend on whether they produce anything new but rather whether they formulate, in a precise and systematic way, rules that exist but are scattered and incoherent. The progressive development of international law and its codification is not the same as creativity and innovation. The question should rather be whether, drawing on existing and available instruments and practice, the Draft Conclusions provide a coherent and systematic framework for the methodology and consequences of peremptory norms and in a manner that enhances its understanding. These Draft Conclusions may not have turned water into wine, but they have taken impurified water and made it potable.[109]

[109] *Ibid*., p.1202.